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No. 97-1560

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,
Petitioners,

v.

KIMBERLY ANN GREENWELL,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. THE RESPONDENT CANNOT RELY ON TIME-BARRED ACTS OF ALLEGED HARASSMENT TO ESTABLISH HER HOSTILE ENVIRONMENT CLAIM

Greenwell argues that Raytheon has erroneously restricted the period of time for evaluating the Guard's alleged harassment to a four month period between April 1, 1994 and July 22, 1994. *See* p. 4, n.4 of Brief in Opposition. However, it was not Raytheon which imposed this time restriction. Instead, the district court correctly limited the jury's consideration of the Guard's conduct to this period when it instructed the jury as follows:

> You, the jury, are called upon to determine whether defendants at any time after April 1, 1994 discriminated against and/or harassed the plaintiff because

> she's a woman and/or retaliated against the plaintiff because of her harassment complaints. Although the parties have presented evidence concerning conduct or action which occurred prior to April 1, 1994, **you are not called upon to determine whether that conduct constitutes discrimination, harassment and/or retaliation or whether any damages should be awarded for that conduct.** However, you may consider the evidence of pre-April 1, 1994 conduct as circumstantial evidence which tends to prove or disprove that the conduct which occurred or allegedly occurred after April 1, 1994 was discriminatory and/or harassment and/or retaliatory. You may give the evidence of pre-April 1, 1994 conduct whatever weight you believe it deserves.

The Court further instructed the jury that:

> To prevail against Raytheon on her claim of harassment, plaintiff must prove by a preponderance of the evidence each of the following elements: (1) that plaintiff is a member of a protected class. In this case, the parties have stipulated that she's a member of a protected class. (2) that **after April 1, 1994,** plaintiff was subjected to harassment by either Raytheon employees or Guard personnel; (3) that the harassment complained of is based upon the fact that plaintiff was a woman; (4) that the harassment complained of affected a term, condition or privilege of employment, i.e., that the harassment was sufficient to alter the conditions of employment and create an abusive work environment; and (5) that the employer knew or should have known of the [post-April 1, 1994] harassment in question and failed to take immediate action.

These instructions were provided to the jury because Greenwell did not file her EEOC charge until January 6, 1995 thereby limiting the period of actionable harassment to 300 days before the charge was filed. *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889

(1977).[1] The Respondent asserts that the jury could have relied on such time-barred acts of harassment because the Guard's conduct constituted a "continuing violation." *See* Brief in Opposition at p. 4, n.4. However, Greenwell never asserted this theory, or objected to the district court's above referenced instruction, until after this case was appealed. Accordingly, Fed. R. Civ. P. 51 precludes Greenwell's reliance on the continuing violation exception as a means to circumvent Title VII's statute of limitations.[2]

Since the jury could not have relied on the pre-April 1, 1994 conduct as proof of actionable harassment, the only two acts of harassment which the jury could have based its verdict on were: (1) the April 1994 tape scraping incident;[3] and (2) the "Kim Basinger" comment.[4] Pursuant to the district court's instruction, the jury could have only used the pre-April 1, 1994 conduct as "circumstantial evidence which tends to prove or disprove that the conduct which occurred or allegedly occurred after April 1, 1994 was discriminatory and/or harassment." In other words, the jury could have only relied on the pre-April 1,

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[1] Since Greenwell filed her charge with a state agency, the limitations period was extended to 300 days. *See* 42 U.S.C. § 2000e-5(e)(1).

[2] Raytheon also denies the applicability of the continuing violation theory to this case. However, since the plaintiff never raised that issue before the district court, it need not be addressed herein.

[3] The April 1994 tape scraping incident refers to Norris Babin's allegedly loud request for Greenwell to remove some tape from the hangar floor.

[4] The Kim Basinger incident refers to Greenwell's subordinate's, Jim Stout's, statement that he wished Kim Greenwell were Kim Basinger. Although the record does not reflect when Stout made this statement, Raytheon addresses it herein to afford the jury's verdict the most favorable light.

1994 conduct to determine whether the post-April 1, 1994 conduct was sex-based and intentional.[5]

Naturally, Greenwell has attempted to bury this critical distinction throughout her Brief in Opposition. However, once this dispositive issue is brought into focus, it is readily apparent that both the district court and the Fifth Circuit deviated from this Court's directive in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370 (1993), in finding that the non-time-barred conduct meets the objectively hostile work environment standard.

II. THE NON-TIME-BARRED CONDUCT CANNOT SATISFY THE OBJECTIVELY HOSTILE OR ABUSIVE WORK ENVIRONMENT STANDARD

Assuming *arguendo* that the non-time-barred conduct was sex-based and intentional,[6] it is still wholly insufficient to satisfy the *Harris* court's objectively hostile work environment standard or the standard adopted by the Circuits subsequent to *Harris*. *See* p. 13 of Petition for Certiorari. The Respondent also contends that the Fifth Circuit's decision on this issue does not create a conflict in the Circuits because the lower court merely rejected Raytheon's sufficiency of the evidence argument without articulating any conflicting standard of law. *See* p. 20, 26-27 of Brief in Opposition. Even if the Fifth Circuit did not identify

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[5] This instruction was consistent with this Court's longstanding precedent that "a discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Airlines, supra* at 558.

[6] Again, the only alleged acts of non-time-barred conduct were Norris Babin's loud request for Greenwell to remove tape from the hangar floor and Jim Stout's statement that he wished Kim Greenwell was Kim Basinger. As previously referenced, the alleged harassment ended on July 22, 1994, the date that Greenwell was transferred from the Lakefront facility, the only facility at which she was allegedly subjected to a hostile work environment.

the legal basis for its holding, the effect of its decision is nonetheless explicit: an employee can recover for hostile work environment sexual harassment by relying on a few isolated instances (in this case, two) of alleged verbal harassment/teasing [7] uttered over a lengthy period of time. This holding clearly contradicts the Fifth Circuit's, as well as the other Circuits', standard of liability for hostile work environment claims. *See* p. 13 of Petition for Certiorari. Further, if the non-time-barred conduct described herein is sufficient to satisfy *Harris*' objectively abusive conduct standard, then employers' liability for such claims has become virtually limitless. Clearly, Congress did not intend for Title VII to be expanded to this degree when it created the statute in 1964.[8]

Greenwell also apparently relies on the Guard's July 1994 complaint letters as evidence supporting the objectively abusive conduct element of her hostile environment claim. *See* p. 8 of Brief in Opposition. However, such evidence is likewise insufficient to support this element of Greenwell's hostile environment claim. *See* p. 13-14 of Petition for Certiorari.

Finally, although the pre-April 1, 1994 conduct need not be considered because it is time-barred, the Court should be aware of a fact that Respondent consistently attempts to gloss over throughout her Brief in Opposition. Greenwell repeatedly asserts that the Guard directed derogatory language at her while in her presence. *See* p. 5-6 and 20-21 of Brief in Opposition. Clearly, Respondent

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[7] Stout's comment was at worst, minor teasing, which Greenwell remedied herself by rebuking her subordinate, Mr. Stout.

[8] The lower court's decision in this case is the type of decision which has created substantial uncertainty among the Circuits and the public regarding an employer's liability for sexual harassment. Indeed, recent questioning during the April 22, 1998 oral argument in *Ellerth v. Burlington Industries, Inc.* (S. Ct. Case No. 97-569) reflects this Court's uncertainty regarding the origin of this whole body of law. *See* 78 DLR A-1 1998 (BNA).

has taken definite liberties with the record as confirmed by the following excerpt from her trial testimony:

> Q. And didn't Col. Nuss tell you there was going to be a change of attitude and he would see to it that no comments such as the BASI-bitch comment was ever made again?
>
> A. Yes. And he was also referring to Maj. Mix calling me the little girl, saying he'd stick me over there in the building over there where no one would have to see me again, that, also.
>
> Q. That also occurred prior to September 29, 1992?
>
> A. Yes.
>
> Q. And those incidents, BASI-bitch, little girl, never happened after September 29, 1992, again, did they?
>
> A. To my face, I **never** heard—no one—I **never** heard any comments that they were making.

Thus, even if the time-barred conduct were considered, statements such as the ones alleged herein cannot satisfy *Harris*' objectively hostile work environment standard, especially when such statements were not even made in the plaintiff's presence.[9]

III. RESPONDENT CANNOT RELY ON WALT HOUSE'S ALLEGED INACTION TO SUPPORT HER HOSTILE ENVIRONMENT CLAIM

Respondent relies heavily on her first supervisor's, Walt House's, alleged inaction in responding to her purported complaints to him about the Guard's conduct towards her between September 1992 and December 1993.[10] Green-

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[9] Greenwell's admission that these statements were not made in her presence likewise precludes her ability to prove that such comments created a subjectively hostile work environment, which is another mandatory element of her claim. *Harris, supra* at 21-22.

[10] House was transferred to a different area in January 1994. Wayne Leese thereafter transferred into the vacancy created by House's departure.

well's reliance on such evidence is both legally and factually incapable of establishing Raytheon's liability.

First, House's alleged inaction is again irrelevant and incapable of establishing Raytheon's liability because "a complaint about time-barred conduct does not satisfy the employee's duty [under Title VII]." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 1998 WL 175313 (5th Cir. 1998); *See also United Airlines, supra* (finding that time-barred conduct is not actionable).

Second, if House's action was so utterly deficient, then Greenwell admittedly could have sought redress from any or all of the following Raytheon employees: (1) the Administrator of Personnel; (2) the Director of Human Resources; (3) Walt House's supervisor; or (4) the President of Raytheon.[11] Moreover, Greenwell informed her psychological counsel that Walt House did a good job controlling the Guard and that the Guard's allegedly harassing conduct did not begin until March 1994, some three months after House had been transferred from Greenwell's area. Accordingly, Greenwell's reliance on House's alleged inaction is both legally and factually inapposite.

Since House's alleged non-responsiveness could not establish Raytheon's liability, Greenwell had to prove that Wayne Leese's alleged inaction established Raytheon's liability. Greenwell only takes issue with the adequacy, not the promptness of Leese's investigation.[12] However, the adequacy of Leese's investigation could only be questioned if the Guard harassed her between May 4, 1994 (date of investigation) and July 22, 1994 (date of trans-

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[11] Also, Greenwell admittedly knew about a toll free ethics hotline to which she could have complained about House's alleged inaction.

[12] Greenwell testified about Leese's May 1994 investigation as follows:

> Q. So you complained and promptly, pursuant to policy, this company launched an investigation.
>
> A. Yes. On this time they did.

fer from Lakefront). The undisputed evidence is that no such harassment occurred during this period. Accordingly, if an employer can still be subjected to liability following a prompt investigation which results in termination of the allegedly offensive conduct, then, contrary to Greenwell's assertion, an employer will be strictly liable whenever an employee lodges a complaint about sexual harassment. Again, Congress could not have intended such an anomalous result when it enacted Title VII.

IV. RAYTHEON'S ALLEGED FAILURE TO OFFER GREENWELL A REBUTTAL OPPORTUNITY DOES NOT ESTABLISH RAYTHEON'S LIABILITY FOR RETALIATION

Greenwell's sole argument in support of her retaliation claim is that Raytheon offered other employees, who had not complained about harassment, an opportunity to rebut the customers' complaints, whereas it did not offer her this opportunity. While Raytheon's Operations Manager testified that employees are sometimes allowed "to explain [their] side of the story", he also testified that Raytheon would have still demoted Greenwell, irrespective of her rebuttal, because the customers' safety is always paramount.[13] Moreover, Greenwell was afforded an opportunity to rebut the Guard's letters, and although she drafted a response letter, she refused to allow Raytheon's Operations Department to review her letter. Thus, if anyone precluded her rebuttal opportunity, it was Greenwell herself.

Finally, even if other non-complaining employees were given opportunities to rebut customers' complaints, the

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[13] The only event which could have prevented Greenwell's transfer and demotion was the Guard employees' withdrawal of their complaints. This was primarily due to the serious nature of the Guard's complaints and because Raytheon's own mechanic had independently corroborated the Guard's most serious complaint, the dangerously deficient maintenance of the C-12's air conditioning system.

critical, uncontroverted fact remains that Raytheon either discharged or demoted each of those employees just as it had demoted Greenwell. Since this is the only relevant adverse employment action, then the applicable law would still preclude Raytheon's liability for retaliation. *See* p. 20-21 of Petition for Certiorari. As such, the lower court's ruling conflicts with the other Circuits' decisions, as well as the Fifth Circuit's existing precedent. *Id.*

CONCLUSION

Before this term ends, this Court will decide four cases addressing an employer's liability for sexual harassment. Although each of those cases concern important issues, Petitioners assert that none of those cases address an issue any more important than the one raised herein, namely, the conduct necessary to create an objectively hostile and abusive work environment. That issue is of utmost importance because it is the starting point for determining an employer's liability in the vast majority of these cases. Presently, however, the applicable legal standard is a moving target which neither the courts nor the public truly understand as evidenced by the jury's decision herein, and the number of cases presently under review by this Court and the Circuit Courts. This Court will not see another case which so clearly falls short of its own standard in *Harris,* or which warrants clarification of the *Harris* hostile work environment standard. If, as in this case, an employer is liable for subjecting an employee to two minor acts of alleged actionable conduct over a four month period, then there is truly no limit to an employer's liability. Accordingly, Petitioners respectfully request that the Court grant a writ of certiorari.[14]

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[14] Petitioners in no way intend to diminish the other reasons for granting certiorari in this case, but merely stress the importance of addressing the hostile work environment standard under the facts of this case.

Respectfully submitted,

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